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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

OPPOSITION OF
Z-Tel Communications, Inc.

Z-Tel Communications, Inc. ("Z-Tel"), through counsel and in accordance with the Commission's June 29, 2001 Public Notice,[1] hereby submits its response in opposition to Qwest's motion to reconsider the Commission's April 27, 2001 *CLEC Access Charge Order* in the above-captioned proceedings and in support of motions to reconsider filed by parties to rescind the "new MSA" rule.[2]

I. INTRODUCTION AND SUMMARY

Z-Tel uses the unbundled network element platform ("UNE Platform" or "UNE-P") as its primary entry vehicle to provide mass-marketed packages of telecommunications and enhanced services to small businesses and residential consumers. As a market entry vehicle, the UNE Platform enables CLECs to have an addressable market equal to that of the incumbent LEC on a *statewide* basis once the CLEC has established the operational arrangement with the appropriate incumbent LEC in a State. Within this established footprint, CLECs utilizing UNE-P typically market

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1 Petition for Reconsideration and Clarification of Action in Rulemaking Proceedings, Public Notice, Report No. 2490 (June 29, 2001).

2 *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket 96-262, Seventh Report and Order (rel. April 27, 2001) (*CLEC Access Charge Order*).

and sell services throughout a given ILEC's service territory within a State. Although in some instances geographic deaveraging of UNE rates makes it difficult for UNE Platform CLECs to serve certain areas profitably, MSA boundaries have not – prior to the Commission's *CLEC Access Charge Order* – played any roll in deployment plans.

In addition, since a UNE Platform CLEC can offer services throughout the incumbent LEC's footprint, CLECs' State tariffs for local exchange service generally denote the largest potential geographic range for local services provided. As a result, at any given point in time, while a UNE Platform CLEC may have paying subscribers in one or a few MSAs in a State, this CLEC is operationally capable, willing and, indeed, often legally required by its State tariff to offer service in other MSAs and rural areas of the State. Thus, although a UNE Platform CLEC invests resources necessary to serve the entire incumbent LEC territory throughout a State, and is often marketing services throughout a State, this same CLEC may not have active consumers in certain MSAs.

In this pleading, Z-Tel opposes Qwest's petition for reconsideration. In its petition, Qwest seeks to (1) tie all CLECs to the access charge rate structure of each competing ILEC[3] and (2) have the ability to refuse unilaterally to purchase access from CLECs that fail, in Qwest's view, to provide "sufficient information" for billing purposes.[4] In addition, Z-Tel supports the view of those petitioners that request that the Commission rescind its new markets rule, which precludes CLECs from charging the Commission's benchmark rate in MSAs entered by a CLEC as of June 20, 2001.

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3 Qwest Petition, 2-3.

4 Qwest Petition, 4.

II. THE COMMISSION SHOULD REJECT THE QWEST PETITION IN ITS ENTIRETY

The Commission should reject Qwest's petition in its entirety. Qwest first requests that the Commission require CLECs to tariff switched access rates according to the same rate and rate structure as the competing ILEC.[5] The Commission rejected this approach in the *CLEC Access Charge Order*, and moreover, the rate-element-by-rate-element approach proposed by Qwest would make the already administratively complex Commission scheme entirely unmanageable – especially for smaller CLECs whose services and market entry plans do not match that of the competing ILEC. Second, Qwest requests that the Commission permit ILECs to refuse to purchase switched access services from CLECs when an ILEC feels that a CLEC is not providing "sufficient information" quickly enough.[6] As Qwest presents no details on what it might consider "timely, sufficient information," the Commission should reject this request as a thinly-veiled attempt to establish yet another reason to withhold access charge payments to CLECs. If Qwest has particular needs or desire for this "information" from any particular CLEC, it may seek to open bilateral negotiations with that CLEC at any time. In addition, the Commission's tariff review and complaint process provide sufficient avenues for Qwest and other IXCs to review the terms on which CLECs offer access services to IXCs.

A. The Commission Should Reject Qwest's Effort to Make the Commission's Benchmark CLEC Access Rate Wholly Unadministrable

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5 Qwest Petition, 2.

6 Qwest Petition, 4.

Although Qwest styles its petition as an effort to ensure that CLECs are charging the "competing ILEC" rate, the reality is that this request is merely an attempt to force CLECs to adopt switched access rates and rate structures identical to those of the ILECs. Qwest proposes that CLECs establish rates that match the "competing ILEC's rate" on an element-by-element basis, such that any element provided by a different LEC would be "subtracted" from the CLEC rate.[7] Such a comparison would quite literally require CLECs to establish access tariffs that mirror the rate structure of every competing ILEC relevant to a CLEC. The Commission rejected this approach in the *CLEC Access Charge Order*,[8] and the Commission should do so again here.

An important and appropriate form of competition in access services is the creation of different rate schedules, service packages, and quality benchmarks. In a competitive access environment, a host of different rate and quality packages would be available to IXCs. Because different CLEC networks may have different functionalities, access rates for different CLECs may legitimately be structured differently. Instead of allowing CLECs to compete with the ILECs on those terms, Qwest's proposal would force CLECs into a particular access rate structure – even if that rate structure did not accurately reflect the costs incurred by that particular CLEC.

In defining its benchmark rates, the Commission expressly stated that "it is based on a per-minute cap for all interstate switched access charges."[9] Indeed, "[t]he

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7 Qwest Petition, 2-3.

8 CLEC Access Charge Order, ¶ 55 (concluding that "our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure").

9 CLEC Access Charge Order, ¶ 55.

only requirement is that the aggregate for these charges, however described in [a CLEC's] tariffs, cannot exceed our benchmark."[10] As such, the Commission clearly set a rate ceiling and affirmatively declined to force CLECs to establish rate structures that mirror those of the ILECs.

In the *Order*, the Commission explicitly declined to order what Qwest suggests. Just as the Commission-set "benchmark" rate is based on a composite, maximum rate, the same is true for calculating the "competing ILEC" rate, which CLECs may not exceed under the "new market" rule. Under the new market rule, CLECs may establish switched access rates that are "equivalent to those of the competing ILEC."[11] Consistent with the Commission's benchmark rate, the competing ILEC rate is "a per-minute cap for all [CLEC] interstate switched access charges" in new markets.[12] As the Commission expressly stated, in "moving CLEC tariffs to the 'rate of the competing ILEC' we do not intend to restrict CLECs to tariffing solely the per-minute rates that a particular ILEC charges for its switched, interstate access service."[13] Accordingly, just as CLECs may tariff up to the benchmark rate in markets served as of June 20, 2001, the Commission's order permits CLECs to tariff up to the competing ILEC's rate in new markets.

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10 CLEC Access Charge Order, ¶ 55.

11 CLEC Access Charge Order, ¶ 59.

12 *Id.*

13 CLEC Access Charge Order, ¶ 54.

In addition to having been rejected already by the Commission, the Qwest proposal would establish a regime of CLEC rate regulation in which CLECs may not be able to fully recover their costs. Such a regime clearly would run afoul of the Act. Since different CLECs have different cost structures, forcing CLECs into a "one-size-fits-all" rate structure that is benchmarked to the ILEC (which may have a different cost structure) runs considerable risk that CLECs would not be able to recover all of their costs in providing access services. Such a situation is possible for UNE Platform providers, because the per-minute and per-port components of UNE costs are determined by State commissions pursuant to Section 252(d) of the Act, and not necessarily in conjunction with FCC review of the same ILEC's interstate access tariff. As a result, it is possible that the per-minute cost of providing a minute of access over the UNE Platform could *exceed* the per-minute interstate access rate for the same ILEC.

Qwest's proposal is also unadministrable for at least two reasons. First, the Qwest approach would require a CLEC (and conceivably this Commission in tariff reviews and complaint proceedings) to conduct element-by-element analyses of the "competing ILEC" rate in every jurisdiction in which a CLEC provides service to determine whether a CLEC's tariff is consistent with the Commission's benchmark. Not only would this create a tremendous administrative burden – it would also severely limit the ability of CLECs to compete with one another and the ILEC in the provision of access services. Second, this approach would require CLECs to file, manage, and update a nearly innumerable number of tariffs for every State, and every competing ILEC within each State. In many States, CLECs may provide service in competition with several ILECs, each of which is likely to have different rates and rate structures for their

switched access services. Under the Qwest approach, a CLEC would have to either maintain separate tariffs for each ILEC footprint, and at a minimum, have to reference such tariffs in order to ensure billing consistent with the rule. CLECs that wish to operate on a statewide basis with a common rate structure across all ILEC territories in that State would be denied that opportunity – and that regulatory fiat would bear no resemblance to the costs incurred by that CLEC.[14] Such an approach is wholly unadministrable, and should be rejected again by the Commission.

B. The Commission Should Reject Qwest's Request to Establish an Additional Means of Withholding CLEC Access Charge Payments

The Commission also should reject as unadministrable Qwest's proposal to clarify that Section 201(a) "does not require an IXC to accept traffic from a CLEC that fails to provide, at reasonable rates, sufficient information for the IXC to bill the CLEC's end users."[15] At the outset, Z-Tel notes that they do indeed provide such information to IXCs in a timely manner pursuant to their tariffs and access agreements, and that Z-Tel understands the need to work cooperatively with IXCs to ensure that end users are billed properly for services received.

Qwest's proposal suffers from material shortcomings, however. First, although Qwest states that certain CLECs fail to provide billing information, Qwest fails

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[14] Consider, for example, a CLEC that chooses to build a network that covers multiple ILEC territories in a particular area (such as the Research Triangle area in North Carolina where BellSouth, Sprint and Verizon all have ILEC presence.) The CLEC may generate considerable economies and consumers in the area may benefit immensely with a common rate structure – but Qwest would instead require the CLEC to file and maintain three different sets of tariffs.

[15] Qwest Petition, 4.

to establish the scope of the problem or its efforts to resolve outstanding issues with the alluded to, but unnamed, CLECs. Second, and perhaps more importantly, Qwest fails to define what it believes is "sufficient information" and how to measure whether the information provided is "timely." At the same time, if CLECs fail to comply with Qwest's unrevealed notions of "sufficient information," provided "timely," Qwest seeks unilateral authority to block traffic originating from CLEC networks. Qwest's proposal that the Commission give IXCs the ability to impose the "death penalty" on CLECs over a question of billing information is clearly unwarranted.

Despite its calls for "deregulation" in other regulatory contexts, Qwest proposes that the Commission implement draconian rules on billing information without even demonstrating that a problem with the current regime exists. In fact, there are in place ample and significant mechanisms for Qwest to obtain the information it seeks from CLECs. Billing and payment information are contained in CLEC interstate access tariffs. If Qwest believes that a particular CLEC does not provide sufficient billing information for interstate access, it is free to open up bilateral, business-to-business negotiations with that CLEC. In that context, the CLEC is bound by Section 201(b) of the Act, which prohibits "unreasonable" practices. Qwest does not provide any example of "insufficient" information in CLEC bills. Qwest also has not shown that it has attempted to remedy those disputes through business negotiations. Qwest has not shown that it has attempted to utilize the FCC tariff review or complaint process to resolve differences on this point.

In short, Qwest has not made a showing requisite to establish any such rule. Therefore, the Commission should reject this request.

III. THE COMMISSION SHOULD RESCIND THE "NEW MARKETS" RULE AND PERMIT CLECS TO CHARGE THE BENCHMARK RATE IN NEW MARKETS

Numerous petitioners[16] request that the Commission rescind its new market rule, 47 C.F.R. § 61.26, and Z-Tel supports those petitioners. Rule 61.26(d) provides that if "a CLEC begins serving end users in a metropolitan statistical area ("MSA") where it has not previously served end users" after the effective date of the Order,[17] the CLEC may not file an interstate exchange access tariff with a price "above the rate charged for such services by the competing ILEC."[18] The Joint Commenters agree with the proposal that the Commission rescind this rule, or at a minimum, delay its implementation for at least one year.[19]

As a preliminary matter, Z-Tel agrees with those petitioners that assert that the Commission promulgated its new market rule without providing adequate public notice.[20] Indeed, any mention of a "new markets" restriction is conspicuously absent from the record in this proceeding. For these reasons, Z-Tel believes that the new markets rule is procedurally infirm, and likely to be ultimately overturned.

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16 *See, e.g.*, Focal Communications and US LEC Petition, p. 2; Minnesota CLEC Consortium, p. 11; Time Warner Telecom Petition, p. 2.

17 The *CLEC Access Charge Order* was published in the Federal Register on May 19, 2001. As a result, the effective date of the Order is June 20, 2001.

18 Commission Rule 61.26(a) defines the term "competing ILEC."

19 Time Warner Petition, 7.

20 Focal and US LEC Petition, 2; Time Warner Petition, 2.

Regarding the substance of the new markets rule, Z-Tel agrees that it improperly ignores the time it takes a CLEC to enter a new market, as well as the resources invested for both market entry and customer acquisition.[21] As noted above, carriers that use the UNE Platform entry strategy expend resources to enter the competing ILEC's entire service territory in a State, not just a single MSA or city. When exactly a carrier obtains a customer in a distinct MSA within a State had absolutely no relevance prior to the *CLEC Access Charge Order*. The new markets rule flatly ignores that state-wide nature of UNE Platform market entry, and the Commission should therefore rescind, or at least delay, its new markets rules to avoid unintended damage to CLEC business plans.

In addition to being procedurally and substantively infirm, the Commission did not take into account the fact that compliance with the "new markets" rule from a technical standpoint may be difficult for many CLECs, as pointed out by many petitioners. Indeed, prior to issuance of the *CLEC Access Charge Order*, interstate access tariffs were generally put in place on a statewide basis. As a result, access billing software in place and in use by CLECs and ILECs prior to the release of the Order did not always note the "originating" and "terminating" MSA for any particular call.

The Commission clearly did not intend Rule 61.29 to delay CLEC entry into new markets. In fact, the Commission drafted its access charge rules so as to

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[21] Focal/US LEC Petition, 8 ("CLECs are not able to enter new markets overnight"); Time Warner Petition, 4 ("When a CLEC develops an overall business plan, it generally determines the set of services that it will provide in the geographic markets it enters in the future.")

"avoid[] unnecessary damage to this growing competition."[22] In addition, the Commission noted multiple times in the *CLEC Access Charge Order* its intention not to disrupt existing CLEC business plans and to give CLECs an opportunity to adjust those plans. However, the net impact of the new MSA rule is to deter entry into new markets and to change those business plans. Changing the expected access revenues in any particular market on the eve of a CLEC offering service delays and hampers that entry. Requiring alterations in billing software prior to entry – even if the CLEC stood on the cusp of offering service in an MSA – directly delays entry. Despite the Commission's intentions, Rule 61.29(d) *does* disrupt CLEC business plans focused on mass market competition. To prevent this harm from occurring, the Commission should grant the Petitions for Reconsideration that would either rescind its new market rule in its entirety, or delay its implementation for at least one year.

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22 *CLEC Access Charge Order*, ¶ 62.

IV. CONCLUSION

Consistent with the foregoing, the Commission should (1) reject the Qwest Petition in its entirety and (2) grant the Petitions for Reconsideration that would rescind Rule 62.29(d).

Respectfully submitted,

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Dated: July 23, 2001

CERTIFICATE OF SERVICE

I, Charles "Chip" M. Hines III, hereby certify that copies of the foregoing **"Opposition of Z-Tel Communications, Inc.; CC Docket No. 96-262"** were delivered on this 23rd day of July, 2001 to those on the following list:

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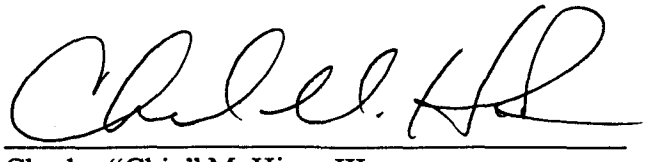

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